# Voest-Alpine Intertrading Gesellschaft mbH v Lee Chung Chuan (t/a Doras Trading Co) & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–890–91
ABDUL MALEK J
21 MAY 1993

***Civil Procedure*** *— Judgment in default of appearance — Application to set aside — Whether order for substituted service had properly identified place of posting — Whether judgment in default was obtained regularly — Whether proper procedure followed*

***Civil Procedure*** *— Pleadings — Statement of claim — Dated earlier before writ — Whether there was irregularity*

This was an appeal by the second defendant against the decision of the senior assistant registrar dated 11 January 1993 dismissing his application to set aside the judgment in default entered against him on 24 December 1991. It was alleged by the appellant that the judgment in default ought to be set aside on the following grounds:

(a) that the judgment in default was not regular in that the court order for substituted service dated 10 October 1991 had not properly identified the place of posting;
(b) that the writ of summons was dated 3 July 1991 whereas the statement of claim was dated 29 June 1991 which was earlier; and
(c) that the second defendant was acting as agent for the plaintiff by selling the plaintiff's products to third parties, that the plaintiff had acted in breach of such contract thereby resulting in the plaintiff owing the second defendant RM931,131.41 and that it was not for the plaintiff to claim RM302,500 from the second defendant.

**Held**, dismissing the appeal with costs:
(1) The judgment in default had been obtained regularly as the order for substituted service was by proper order of court and the plaintiff had followed the relevant procedure. The place of posting had been amply described in the court order by the given address and the relevant affidavit of posting filed on 26 November had clearly stated that the relevant documents had been posted at a conspicuous place at the said address.
(2) A statement of claim has to be prepared before the writ is filed and therefore, the court ruled that it was in order for the statement of claim to be dated a few days before the writ.
(3) The second defendant had not raised any triable issues as to the plaintiff's claim as all his allegations were in respect of a contract before the one on which the plaintiff had based their claim.

**Per curiam**:
A distinction has to be made between a statement of claim and an affidavit. An affidavit filed before the writ certainly is not admissible as there is no pending cause or matter to consider that particular affidavit. On the other hand, a statement of claim has to be prepared before the writ is filed. As for an affidavit in support of an application in a pending cause or matter, the position is of course different as it is admissible as there is already in existence a pending cause or matter.

**[Bahasa Malaysia summary**

Ini merupakan rayuan dari defendan kedua terhadap keputusan penolong kanan pendaftar yang bertarikh 11 Januari 1993 menolak permohonan beliau untuk mengetepikan penghakiman ingkar yang telah dicatatkan menentang beliau pada 24 Disember 1991. Defendan kedua telah berhujah bahawa penghakiman ingkar itu sepatutnya diketepikan atas alasan-alasan berikut:

(a) penghakiman ingkar itu tidak mengikut aturan kerana perintah mahkamah untuk penyampaian ganti yang bertarikh 10 Oktober 1991 itu tidak menyatakan dengan betul tempat mengepos;
(b) writ saman itu bertarikh 3 Julai 1991 manakala pernyataan tuntutan bertarikh 29 Jun 1991 iaitu lebih awal; dan
(c) defendan kedua bertindak sebagai agen plaintif apabila menjual hasil pengeluaran plaintif kepada pihak ketiga, dan plaintif telah bertindak mengingkar kontrak itu menyebabkan plaintif berhutang sebanyak RM931,131.41 kepada defendan kedua dan plaintif tidak berhak menuntut RM302,500 daripada defendan kedua.

**Diputuskan**, menolak rayuan itu dengan kos:
(1) Penghakiman ingkar itu telah diperolehi mengikut aturan kerana perintah untuk penyampaian ganti itu merupakan perintah wajar oleh mahkamah dan plaintif telah mengikuti prosedur yang relevan. Tempat mengepos telah digambarkan dengan memadai di dalam perintah mahkamah dengan alamat yang dinyatakan dan afidavit mengepos yang relevan yang telah difailkan pada 26 November telah menyatakan dengan jelas bahawa dokumen yang relevan itu telah diposkan di suatu tempat yang mudah dilihat di alamat yang dinyatakan itu.
(2) Suatu pernyataan tuntutan mesti disediakan sebelum writ itu difailkan dan oleh yang demikian, mahkamah itu telah memutuskan bahawa adalah mengikut aturan untuk pernyataan tuntutan itu bertarikh beberapa hari sebelum writ itu.
(3) Defendan kedua tidak membangkitkan sebarang isu yang boleh dibicarakan mengenai tuntutan plaintif kerana kesemua tuduhan beliau berkaitan dengan kontrak sebelum kontrak atas mana plaintif mengasaskan tuntutannya.

**Per curiam:**
Suatu perbezaan boleh dibuat di antara suatu pernyataan tuntutan dan suatu afidavit. Suatu afidavit yang difailkan sebelum writ itu tidak boleh dimasukkan kerana tidak terdapat kausa atau perkara yang belum selesai (pending) untuk menimbang afidavit itu. Sebaliknya, suatu pernyataan tuntutan mesti disediakan sebelum writ difailkan. Untuk suatu afidavit menyokong permohonan dalam suatu kausa atau perkara yang belum selesai, keadaan adalah sememangnya berlainan kerana ia boleh dimasukkan disebabkan adanya suatu kausa atau perkara yang belum selesai.]

**Notes**
For a case on judgment in default of appearance, see 2 *Mallal's Digest* (4th Ed) para 1233.
For cases on the statement of claim, see 2 *Mallal's Digest* (4th Ed) para 1776–1779.

**Case referred to**
1 *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 (folld)

*VL Yiew* (*CH Yeoh & Yiew*) for the second defendant/appellant.
*SVS Param* (*Lewis & Co*) for the plaintiff/respondent.

**Abdul Malek J**: On 11 January 1993, the learned senior assistant registrar had dismissed with costs the second defendant's application filed on 21 May 1992 to set aside the judgment in default made against him on 24 December 1991.

In this appeal before me, learned counsel for the second defendant had raised a number of issues. One was that the judgment was not regular having been made after service by substituted service. Further, learned counsel had submitted that the court order for substituted service on 10 October 1991 had not properly identified the place of posting. It is to be noted that the relevant excerpt of that order had stated that valid copies of the order, writ of summons and statement of claim were to be posted on the court notice board in Kuala Lumpur and at the first defendant's place at 593A, and at the second defendant's place at 585, both at 3 3/4 mile, Jalan Ipoh, 51200 Kuala Lumpur.

The next issue was that the writ of summons was dated 3 July 1991 whereas the statement of claim was on 29 June 1991 which was earlier. Learned counsel for the second defendant's third issue pertained to the allegations of the second defendant in his affidavit filed on 20 July 1992, namely, that the second defendant was acting as agent for the plaintiff by selling the plaintiff's products to third parties. In this regard, it had been deposed that the plaintiff had not supplied the goods ordered by the third party, who had consequently refused to pay the second defendant, according to specifications and had not taken into account the payments made direct to them by the third party. The affidavit had went on to say that the plaintiff had also failed to deduct the expenses for customs, port, marine insurance,

transport, loading, storage, bank and delivery charges which were payable by the plaintiff and that the plaintiff had also not accounted for the payments already made by the second defendant nor had paid the agent's commission due to him. In the event, learned counsel for the second defendant had concluded that the plaintiff in fact was the one who owed the second defendant RM931,139.41 and it was not for the plaintiff to claim RM302,500 from the second defendant.

In reply, learned counsel for the plaintiff had argued that there was no irregularity situationed by the fact of the statement of claim being dated earlier than the writ of summons as that was in the normal course of things. He, however, pointed out that similarly it was the second defendant's summons-in-chambers to set aside the judgment in default which was not in order as the affidavit supporting the application was dated 14 May 1992 whereas the summons-in-chambers had been filed on 21 May 1992.

Learned counsel for the plaintiff had also explained that all the allegations made by the second defendant in his affidavit dated 20 July 1992 based on set off related to a different contract altogether and not on that relied upon by the plaintiff for his claim, namely, the agreement that was dated 13 October 1987. In fact, he pointed out that all the second defendant's exhibits annexed to his affidavit supporting the set off related to accounts before this particular agreement.

To my mind, the judgment in default had been obtained regularly as the order for substituted service was by proper order of court and the plaintiff had followed the relevant procedures. The place of posting had been amply described in the court order by the given address and the relevant affidavit of posting filed on 26 November 1991 had clearly stated that the relevant documents had been posted at a conspicuous place at the said address. In consequence, the court had to consider if there was a defence on the merits and on the arguments here, there was certainly no doubt that the second defendant has not raised any triable issues as to the plaintiff's claim as all his allegations are in respect of a contract before the one on which the plaintiff had based their claim.

The Supreme Court ruling in *Fira Development Sdn Bhd v Goldwin Sdn Bhd*[1] is indeed a good guide to cases of this nature. There, it was held that:

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the court should act in *Evans v Bartlam* [1937] AC 473 in these words:
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> > ... The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

In the instant case the learned judge did not consider the judgment to be irregular. 1 *Mallal's Supreme Court Practice* (2nd Ed) at p 84 explains the position where the judgment is regular thus:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or for some very

sufficient reason: *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v Richter* (1889) 23 QBD 124.

A defence on the merits means merely raising only an arguable or triable issue, for example contributory negligence in a running down case in *White v Weston* [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L Oppenheim & Co v Mahomed Haneef* [1922] 1 AC 482.

As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously, the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. Clearly, the application should be made promptly and within a reasonable time. But the court will in a fit case disregard lapse of time: *Beale v MacGregor* (1886) 2 TLR 311.

On these considerations, there was certainly no reason to set aside the judgment in default here.

As regards the dates of affirmation and filing, *Mallal's* at p 476 had in the light of O 41 r 1 of the Rules of the High Court 1980 provided that:

... the necessity to intitule the affidavit in the cause or matter for which it is sworn or affirmed would appear to mean that the affidavit sworn before the issue of the writ would be inadmissible. It was so held in *H Stacey v Diamond Metal Products Co Ltd & Anor* [1935] MLJ 249. After a threat of action but before the writ, H, on the request of the defendants, made, in England, an affidavit as to certain matters in issue in the action of which no other person could give evidence for the defendants. H died before the issue of the writ. It was held that the affidavit should not be used as evidence under O XXXV r 1(2) RSC 1934 (now O 38 r 2) as it was not made in a pending cause or matter and also because the plaintiff had no opportunity of cross-examining on it. But an affidavit in support of an application for an injunction sworn two days before the issue of the writ was received and the order made on the plaintiff's undertaking to have the affidavit re-sworn and filed: *Green v Prior* (1886) WN 50'.

A distinction has to be made between a statement of claim and an affidavit. An affidavit filed before the writ certainly is not admissible as there is no pending cause or matter to consider that particular affidavit. On the other hand, a statement of claim has to be prepared before the writ is filed. As for an affidavit in support of an application in a pending cause or matter, the position is of course different as it is admissible as there is already in existence a pending cause or matter. In the result, both the statement of claim dated a few days before the writ here and the supporting affidavit dated a week before the filing of the application to set aside the judgment in default here are both quite in order.

In the final analysis of the matter before me, since the judgment in default here was regular and the non-acceptance of the triability of the issues raised meant that there was no defence on the merits, I had dismissed the second defendant's appeal with costs.

*Appeal dismissed.*

Reported by Yap Foo Ken